

**Freedom of Information, Open Meetings, and Public Records
Legislative Interim Study Committee
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**Statement of
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One of the basic democratic rights is that of citizens to have knowledge of government activities and the right of those citizens to hold their government accountable for its actions. In Iowa, citizen rights related to knowledge of government meetings, and the right to attend those meetings, is protected by Chapter 21 of the *Code of Iowa*. Citizen rights of access to state and local government records are established in Chapter 22 of the *Code*. Chapter 305 outlines the methods to be used to assure that state government records are retained for as long as they are needed for administrative, legal, fiscal and historical purposes. The three chapters are related but each addresses a separate and distinct function. Chapters 21 and 22 of the *Code* apply to local governmental units as well as to state government agencies. Chapter 305 applies only to state government agencies (with the exception of the Board of Regents institutions and the Department of Transportation). Chapter 305 provides the opportunity for the State Archives and Records Program to provide technical assistance and training to local government agencies on records management issues.

I offer my perspective on Chapter 22 and Chapter 305 as they relate to government records. My knowledge and expertise is in the area of public records, not specifically in the area of public meetings. Chapter 22, the state's "Fair Information Practices Act," addresses the need for records custodians to provide public access to all public records that are not deemed confidential. This chapter provides the guidance needed to respond to members of the public when access to a particular record or group of records is requested. Chapter 305 provides the methodology for determination of how long state government records need to be retained and when it is appropriate to move state government records from agency offices to the State Records Center as well as when it is appropriate to dispose of records either by destruction or by transfer to the legal custody of the State Archives.

The State Archives provides legal custodial services for records that are determined to be of "permanent" value. That is, through application of the procedures established in Chapter 305 and rules developed to implement that chapter, the State Archives accepts full legal custody of records destined to be preserved "forever" and provides for the preservation of those records while providing public access to those records. As the State Archives provides public access to state government records, it looks to Chapter 22, other code sections, state agencies and agency administrative rules to determine what can and what cannot be released to the public through our reading rooms.

Transparency is essential for the public to understand government actions. At the same time, confidentiality of some government records is essential to protect the rights of individuals.

Achieving the delicate balance between rights of privacy and rights of access is a daunting task. Chapter 22 currently includes fifty-seven specific exceptions to open disclosure of public records (other code sections also identify the confidentiality of specific records). The number of exceptions has increased as additional records series are identified as having the potential for invasion of individual privacy rights or are determined to be sensitive or confidential for other reasons.

A need exists for clear guidance and consistent definitions of what constitutes privacy and what constitutes a governmental invasion of that privacy. When it is necessary for government to obtain private information, how must we protect that information so as to protect the rights of our citizens?

As this Committee evaluates public access to government records, I am concerned that the public has open and unrestricted access to as wide a range of government records as can responsibly be released. At the same time, I am aware that some state government records are destined for permanent preservation in the State Archives of Iowa. Those records identified as having permanent value in accord with Chapter 305, are held in trust for the public by the State Archives of Iowa. Our mission is to make sure those records are preserved and made available to current and future generations. We do so to assure that citizens are able to understand what their government has done, and in so far as they are able to discern, why government took a particular course of action. Some government records are preserved because they document specific government actions, some are preserved because they validate individual rights, some validate the rights of government and others are preserved because they document changes in societal values or shed light on the state's history. Records are often preserved because they include information that is valuable for reasons other than those for which the data were originally obtained.

When government records are transferred from the legal custody of individual state agencies to the State Archives, the legal responsibility for maintaining the confidentiality of records also transfers to the State Archives. The State Archives uses Chapter 22 as the principal, but not exclusive, *Code* reference, along with agency administrative rules and direct guidance from the state agencies, to identify which records are confidential and which are open public records. The State Archives looks to the *Code* to determine which records can be released to the public and which must be maintained as confidential. When we do so, we are perplexed by the question of how long records must be retained as confidential.

Some records that contain private information have long-term research value. Institutional case files for individuals, for example, may contain valuable information for family historians. They may also contain important information for understanding the care and treatment of particular diseases or conditions. It is important to protect the privacy of the subjects of these cases files and that right to privacy is acknowledged through Chapter 22 and other sections of Iowa code. However, an important question related to these records is not answered in the Code. As historians and as archivists, we must ask "how long does a right to privacy extend?" Does the subject of a case file created in 1872 have the same right to privacy in 2007 as does the subject of a case file created in 1972? When does society's right to know become more important than the rights of the subject of a file?

The same question can be asked of attorney-client confidentiality and the common law concept of executive privilege. I understand and respect the basic principles in both of these concepts. As with individual case files, the question remains: “how long do the concepts of attorney-client privilege and executive privilege extend?” At present, the statutes seem to be silent on this question. For the State Archives of Iowa, it is perplexing issue. As you should expect, the State Archives holds gubernatorial records for all of Iowa’s governors (more records for some than for others and the volume and complexity of records for contemporary governors is increasing). Within those records are matters that fall into the categories of attorney-client privilege and executive privilege. At present the records of attorney-client discussions in the records of Governor Samuel Kirkwood hold the same degree of confidentiality as those of Governor Tom Vilsack. Is that really the intent? Is that really in the best interest of Iowa? Should there be a time at which issues of attorney-client privilege and executive privilege end?

Some records identified as confidential in Iowa are open records in other jurisdictions. If possible, clarification of this issue would be helpful. Consistency in application of concepts of confidentiality across government jurisdictions (federal-to-state and state-to-state) will be very helpful to records administrators. For example, death, marriage and divorce records are closed public records in accord with *Code of Iowa* section 144.43. Vital records in the custody of the State Archives may be released to the public provided they are seventy-five years old or older. (This is one case where a definite end to the period of confidentiality is clearly stated in statute.) The perplexing issue, however, is one of consistency. While death records are closed in Iowa, records of death in other states are open for research. Indeed records of death maintained by the Social Security Administration are open for public access almost immediately after the death event. The Social Security Death Index includes date of birth and date of death as well as social security number for the deceased. Access to the application for social security number which includes birth place and parent names is available through the Social Security Administration.

The question then is how do we establish consistency in application of confidentiality among different government bodies?

Most state agencies consider social security account numbers, *ipso facto*, to be confidential data. Many times social security numbers, including social security numbers for dead people, appear in historic government records. Given that the Social Security Administration appears to consider social security numbers of dead persons to be open records, how should Iowa statutes direct state agencies, and the State Archives, to administer records containing these numbers? Should state agencies be required to redact social security numbers whenever and wherever they appear in public records before permitting public review of government records? Is that consistent across jurisdictions? If redaction of social security account numbers or other confidential data is undertaken, may state agencies charge the requester of the records for the cost of conducting the redaction? Are state agencies required to conduct redaction exercises to provide public access to records that contain some confidential data when all of the data in a record is not considered to be private or confidential? I am not sure Chapter 22 is clear on this subject.

As we look to protect privacy and to provide public access to government records, we must acknowledge that government records come in all forms, shapes and media. Creation or maintenance of a government record in a particular medium does not change that record’s status

as confidential or open. All government records are subject to public release regardless of medium in which they are maintained. Conversion of records from one medium to another does not modify their status as confidential or open records. The basic tenet of records issues is that the information in the record, not the medium of the record, governs all matters of preservation or access. The technology used to create, store or access government information is simply a tool – technology does not determine, or influence, either how long a record needs to be retained or whether that record is confidential or open.

For many years, the State Archives and Records Program has used research agreements as a means of supporting academic or scholarly research when confidential records are crucial to a particular research project. In collaboration with the agency that originally created the records, the State Archives negotiates a research agreement with the requesting researcher which identifies the material to be used and the basis for confidentiality related to those records, the conditions related to the research, and requires the researcher to agree to maintain the confidentiality of all subjects. Most often these agreements have been applied to institutional case file materials. The State Archives has entered into these research agreements in an effort to further scholarly research while maintaining the privacy rights of individuals. We have relied on a broad interpretation *Code of Iowa* section 144.44 as setting a framework for research agreements for use of confidential records.

Recommendations

1. We recommend that the period of confidentiality for individual records series be limited to an appropriate length of time. For some records, such as birth and adoption records and institutional case files, the period needs to be sufficiently long to protect the rights of the individuals – perhaps as much as 75 to 100 years. For other records, such as attorney-client privilege or executive privilege, the period may appropriately be much shorter. By acknowledging the period for which the confidential status applies, the state agencies and the State Archives will be able to protect the privacy rights of individuals while also working to enhance historical research and understanding.
2. The State Archives encourages the careful review of confidentiality provisions in other jurisdictions to assure that Iowa's provisions are consistent with other states and with the federal government.
3. If possible, inclusion of a definition of executive privilege would be very helpful, not just to the State Archives as we administer records in our custody, but also to the staff of executive offices so they can clearly know which records are considered to be confidential.
4. The definition of "lawful custodian" in chapter 22 should be clarified. As it currently reads, the definition appears to indicate that the party in physical possession of a record is the lawful custodian. The current definition is further confused by naming the agency that owns the record to be the lawful custodian if the record is held by a non government body. I have always considered the lawful custodian to be the agency that created or received the record in the regular

course of business. In my opinion, transfer of legal custody to another agency can only take place through use of a written instrument such as the transfer document used to transfer legal custody of state agency records from the originating agency to the State Archives. I am of the opinion that a government agency cannot transfer legal custody of public records to a non governmental body. Clarification of this definition will be helpful to all working to administer this chapter.

5. As the exceptions currently in Section 22.7 are reviewed, use of the clearest possible language will be helpful to all concerned – the agencies as they administer the chapter, the State Archives as ultimate trustee of some of these records, and to the public as they understand what can and what cannot be made available to them.

6. Inclusion of a specific authorization for the State Archives of Iowa to enter into binding research agreements with academic researchers for bona fide research projects not for private gain will clarify the legality of these instruments. I suggest the addition of a paragraph to 305.9 (2) to authorize use of such research agreements.